1953

Miles Murray Smith v. Phyllis D. Smith : Brief of Respondents

Utah Supreme Court

Owen & Ward; E. Earl Greenwood, Jr.; Attorneys for Respondent;

IN THE SUPREME COURT OF THE

STATE OF UTAH

MILES MURRAY SMITH,

Plaintiff and Appellant,

vs.

PHYLLIS D. SMITH,

Defendant and Respondent.

Civil No.
8004

RESPONDENT'S BRIEF

OWEN & WARD, and
E. EARL GREENWOOD, JR.

Attorneys for Respondent

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RESPONDENT'S BRIEF

STATEMENT OF FACTS

To avoid repetition and consumption of the Court's time, Respondent agrees generally as to the chronology and events set forth in Appellant's Statement of Facts, except as hereinafter noted, and Respondent wishes to make an additional Statement of Facts which should be called to the Court's attention, as follows:

Respondent testified that she is natural mother of child and cared for him from birth to the time of divorce (28 months).(R.34,40) That after the divorce (June 4, 1951), when Respondent was working out of town in Tod Park (Tooele, Utah), Respondent visited the child and took him with her on week-ends, generally all day on Saturday and half of Sunday, and that she generally saw him at least twice a week. (R. 35) That since Respondent's marriage to Steve Trask on July 6, 1952, and prior to the time it was necessary for Respondent and her husband to leave for California to obtain work (November 28, 1952), that Respondent had a home and obtained the child and had him with her in her home generally all day, three or four times a week (R. 36). That Respondent left Salt Lake City November 28, 1952, and returned January 29, 1953, to visit the child. (R. 37)

That prior to leaving for California, Respondent and Appellant agreed to an exchange agreement of custody periods of the child, wherein Respondent was to allow Appellant to have her custody period beginning on December 4, 1952, and that on about May 1, 1953, Appellant was to give Respondent custody through a major portion of his six-month custody period, which under the decree began on June 4, 1953. (R. 36, 37, 44) Respondent admitted the essential terms of the agreement. (R. 22, 23, 24) Respondent's testimony was that she stated to Appellant that she would not have gone to California (on November 28, 1952) unless Appellant agreed to such exchange of custody. (R. 37, 44) Respondent testified Appellant repudiated the agreement on February 7, 1953, and claimed he was getting full custody of the child. (R. 37) Appellant admits repudiation of the exchange agreement for custody on or about February 7, 1953, and that he

sought to have Respondent sign a waiver of her right of custody of the child. (R. 22,23, 24)

Respondent testified that she has a natural mother's love and affection for her child and desires that her child live with her and that she will do all possible to educate the child and fulfill his needs. (R. 38) Respondent testified she would spend full time caring for the child. (R. 47) Respondent testified that the child recognizes her as his mother. (R. 47) The testimony of Betty McKendrick was that she visited frequently with Respondent and the child, and that the child recognized Respondent as his mother. (R. 57) The testimony of Gladys LaVon McKendrick was that she knew the Respondent very well, had been in the presence of Respondent and her child a considerable number of times since the divorce of the parties, and

that the child appeared to have a natural affection for Respondent, and regarded her as his mother. (R. 71) The testimony of Bessie Shepheard, Respondent's mother, was to the same general effect. (R. 64)

Steve Trask, Respondent's husband, testified that he has been acquainted with the child for approximately a year prior to this hearing (R. 53), and that he has an affection for the child, and wants to have the child in his home. (R. 53) He further states he is willing to see that the child gets an education, and he will support him if necessary. (R. 54) He testified that he was earning $320.00 per month clear in California at the time this proceeding was instituted. (R. 62) He admits non-support of a child by a former wife, but states that he loves his present wife, the Respondent, and wants her to have her son, and thinks that they can make a happy home for the

child. (R. 60) He states it was necessary for him to go to California in November of 1952 to obtain steady employment as a roofer to meet bills and obligations incurred account sickness. (R. 61)

Respondent's testimony (R. 50), the testimony of Betty McKendrick (R. 70, 71) and Gladys LaVon McKendrick (R. 72) and the testimony of Bessie Shepheard (R. 65, 66) indicate that, since the divorce, they have seen Appellant on the various occasions described in said references to the record, on which occasions Appellant had been drinking to the extent described in the record. Respondent testified that on two occasions Appellant picked up the child at her home when Appellant was drunk. (R. 50) Respondent admits drinking with Appellant on some of the occasions on which they went out, but denies that she was drunk. (R.51) Appellant's mother testified that she knew that Appellant drank, but ascribed as the reason therefor, that he was so nervous. (R.75)

Respondent controverts the Statement of Facts contained in Appellant's Brief, in the following particulars:

Appellant asserts the Respondent failed to assert her right to custody on December 4, 1951.(Appellant's Brief, page 2) Respondent testified that after the divorce (June 4, 1951), it was necessary to work to support herself (R. 34); that she could not then give the child a good home where she was working, and decided it was best to leave the child in the home of Appellant's mother. (R. 35) Appellant assigns as an additional reason for failing to assert custody at that time, that Respondent was in California on a trip when the custody period began. (A.B.,p.2) Respondent asserts that her reason for failing to exercise custody at that time was as above stated (R. 35), and that she was in California about 13 days. (R. 45)

Contrary to Appellant's contention that Respondent made a "tentative trade of custody periods with Plaintiff" (A.B., p. 3), Respondent testified that such agreement for exchange of

custody periods was a definite agreement as cited in the foregoing additional statement of facts herein.

Appellant alleges that a trust fund, derived from funds of Appellant's wife, has been set up for the education of the child. (A.B., p.4). The evidence of Appellant's wife is that no trust fund had been set up at the time of hearing. (R. 29)

Appellant states that Respondent now lives in San Diego, California, with her husband in another woman's home, wherein Respondent takes care of the home and the other woman's children. (A.B., p.4) Respondent testified that she lived at the California address given prior to this proceeding, but stated at time of the proceeding that she was living with the child in the home of her mother, Bessie Shepheard, (in Salt Lake City, Utah).(R. 38, 63). The Trial Court ordered that the child be not removed from the State of Utah for 60 days following

date of decree. (R. 62)

Appellant states it is "necessary that defendant's husband make two interstate moves during the normal school year" between California and Utah. (A.B., p. 4) Respondent's husband, Steve Trask, testified his main occupation was as a roofer; that there was no roofing wrk in Salt Lake City during winter months. (R. 54, 55, 57) He also testified that if it was necessary to keep the child in Salt Lake City, he would take something else, such as painting or other types of work. (R. 55, line 11) (R. 58, line 8)

STATEMENT OF POINTS

I

RESPONDENT CONTENDS THAT THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING OF FACT NO. 7 (R. 81) TO THE EFFECT THAT UNDER THE CIRCUMSTANCES NOW PREVAILING, WHICH HAVE MATERIALLY CHANGED SINCE THE DECREE OF DIVORCE, IT IS IN THE BEST INTERESTS OF THE FOUR-YEAR OLD CHILD HEREIN TO AWARD HIS CUSTODY TO THE RESPONDENT MOTHER.

II

THAT THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUFFICIENT TO SUPPORT THE DECREE HEREIN.

III

THAT APPELLANT'S MOTION TO AMEND FINDINGS OF FACT WAS PROPERLY DENIED BY THE TRIAL COURT.

IV

RESPONDENT CONTENDS THAT THE TRIAL COURT MADE ITS AWARD OF CUSTODY OF THE FOUR-YEAR OLD CHILD TO RESPONDENT MOTHER, IN THE BEST INTERESTS OF THE CHILD UNDER THE PROVISIONS OF TITLE 30-3-5, U.C.A. 1953 - AND NOT UNDER THE PROVISIONS OF TITLE 30-3-10, U.C.A. 1953.

POINT I

RESPONDENT CONTENDS THAT THE EVIDENCE IS LEGALLY SUFFICIENT TO SUPPORT THE TRIAL COURT'S FINDING OF FACT NO. 7 (R. 81) TO THE EFFECT THAT UNDER THE CIRCUMSTANCES NOW PREVAILING, WHICH HAVE MATERIALLY CHANGED SINCE THE DECREE OF DIVORCE, IT IS IN THE BEST INTERESTS OF THE FOUR-YEAR OLD CHILD HEREIN TO AWARD HIS CUSTODY TO THE RESPONDENT MOTHER

It appears that all of the points, with the exception of the first part of Point No. 4 which will be treated hereafter, relied upon by Appellant in his Brief, substantially raise one question, i.e., is there sufficient evidence in the record to support the Findings of Fact, Conclusions of Law, and Decree made by the Trial Court?

For this reason, Respondent has expanded her Statement of Facts and has made reference to the record, citing evidentiary testimony from which the Trial Court could have found, as it did, that the child's best interests would be served by awarding custody to Respondent mother, and from which evidence the Supreme Court in its review of both the law and the facts, can resolve whether said finding is sufficiently supported

In equity cases the appeal may be on questions of both fact and law. (Const. Utah, Art. 8, Sec. 9)

In Covey vs. Roberts, 25 P. 2d 940, _____ Utah _____, as to the scope of review of the Appellate Court in an equity case involving an action to impress a trust on certain property, this Court said:

> ". . .On such review the duty of this court requires an examination of all questions of law and all facts revealed by the record, and after making such examination and due allowance for the better opportunity afforded by the trial court to observe the demeanor of witnesses, and more advantageous position of determining their credibility, and the weight to be given to the testimony submitted, this court, analagous to a trial de novo on the record, will determine from a fair preponderance or greater weight of the evidence whether or not the findings of the trial court are supported thereby. Lawley vs. Hickenlooper, 61 Utah 298, 212 Pac. 526."

In a recent case involving a contest between parents for modification of a decree as it pertained to the custody of a child, this Court made an even stronger statement regarding the weight to be given by the Appellate Court to the Trial Court's evaluation of the evidence where the trial

see. Justice Wade,

in Stuber vs. Stuber, 244 P. 2d. 650, ____Utah ____, speaking for the majority of this Court, said:

> "This opinion of the Court should be given great weight (underscoring is Respondent's) in evaluating the evidence, since the trial judge saw and heard the witnesses and was in a better position than we are to evaluate it. Walton vs. Coffman, 110 Utah 1, 169 P. 2d, 97."

The reasons for this rule are apparent, especially in child custody cases where the Trial Court must weigh the particular circumstances which obtain and the qualifications of the persons involved, in evaluating the evidence and credibility of the witnesses.

In the case before the Court, as in Stuber vs. Stuber, the trial judge had the opportunity to see and hear the witnesses and evaluate their testimony and their credibility as witnesses. After so doing, the Trial Court awarded custody of the child to Respondent.

POINT II

THAT THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW ARE SUFFICIENT TO SUPPORT THE DECREE HEREIN

[illegible] this case are:

(1) the fitness of the parent for custody; (2) the best interests of the child; and (3) a change of circumstances since the divorce. Respondent contends that the Court's Findings of Fact reflect these issues (R. 79, 80, 81) and that the Conclusions of Law (R. 81) and the Decree (R. 82, 83) accord therewith.

Respondent denies, as alleged in Appellant's Brief at pages 12 and 13, that it is necessary that the Trial Court find expressly both affirmatively and negatively on the one issue of the best interests of the child. By affirmatively finding it to be in the best interests of the child to award custody to Respondent, the Court did all it was required to do.

It appears that the issues numbered 2, 3, 4 and 5 at page 12 of Appellant's Brief may be considered under the one ultimate issue of the award of custody in the best interests of the child, which issue was adequately dealt with by the Trial Court, as above stated.

POINT III

THAT APPELLANT'S MOTION TO AMEND FINDINGS OF FACT WAS PROPERLY DENIED BY THE TRIAL COURT

As to Appellant's Point No. 3, this point is disposed of, if on review the Supreme Court finds there is sufficient evidence to support the Findings of Fact, Conclusions of Law, and the Decree of the Trial Court. Respondent contends that the evidence is legally sufficient, and that the motion was properly denied.

POINT IV

RESPONDENT CONTENDS THAT THE TRIAL COURT MADE ITS AWARD OF CUSTODY OF THE FOUR-YEAR OLD CHILD TO RESPONDENT MOTHER, IN THE BEST INTERESTS OF THE CHILD UNDER THE PROVISIONS OF TITLE 30-3-5, U.C.A. 1953 - AND NOT UNDER THE PROVISIONS OF TITLE 30-3-10 U.C.A. 1953

There is no mention in the record that the Trial Court in awarding custody of the child to Respondent based the award upon Title 30-3-10, U.C.A., 1953, i.e., upon the statutory right of the mother to custody of children under ten years of age in case of separation. Appellant is attempting to assign this basis as the reason for the lower court's decision and award of cus-

tody, apparently on the theory that the evidence so preponderates in favor of the Appellant that only by the lower court's application of 30-3-10, U.C.A., 1953, could the Trial Court have awarded custody to the Respondent, and that as 30-3-10, U.C.A., 1953, covers cases of separation only, the Trial Court erred.

This theory appears to be fallacious when reference is made to the Trial Court's Finding of Fact No. 7 (R. 61), which expressly states the basis of the Trial Court's decision to be the award of custody to the Respondent in the child's best interests.

It follows that if Finding of Fact No. 7 is supported by evidence of a sufficiency which satisfies the Appellate Court, that the Trial Court did not err, and the award of custody was properly made.

CONCLUSION

Cogent reasons exist for award of custody of a child of tender years, in this case a child of four years of age, to its mother. Volumes have been written on the mother-child relationship, and of the psychological and sociological needs of one for the other. Generally, the special interest of a mother in her child, and the things which she is willing to do for it, are unique, and countless court decisions recognize this by their awards of custody of children of tender years to the mother in the child's best interests.

Chief Justice Larson, in his dissent in Walton vs. Coffman, 169 P. 2d 97, 110 Utah 1, eloquently typified the relationship as follows:

> "A mother's worries, cares, caresses, tears and prayers are stimulating and potent reclaiming agencies in the lives of all of us. The sense of obligation and devotion to those who gave us being is a different feeling from that felt towards one who gives us shelter."

The Trial Court was satisfied in this case that the child's best interests would be served by an award of custody to the Respondent mother.

Undoubtedly the Court took into consideration the period of the Respondent's attendance of the child from birth to time of divorce; her expressed love and concern for the child, which was manifested by the frequency and duration of the visits and periods during which she had the child with her while the child was in custody of the Appellant; the age of the child; the age of the mother; and the age of Appellant's wife, 41 years; and the fact that Appellant's wife had had no children of her own, nor had she raised other children. (R. 28)

Respondent contends there is ample evidence to support the Findings of Fact, Conclusions of Law, and the Decree of the Trial Court, and that the Trial Court committed no error.

Respectfully submitted,

OWEN & WARD, and
E. EARL GREENWOOD, JR.,

Attorneys for Respondent